REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 61 OF 2019

SIRIBA ONTITA.....APPELLANT

-VERSUS-

ALBERT MONGARE OKEMWA.....RESPONDENT

(Being an appeal from the judgment of the Honourable Principal Magistrate Naomi Wanjiru

dated 21st May, 2019 in Eldoret Chief Magistrate's Court Civil Suit No. 734 of 2014)

JUDGMENT

1. The appellant **(SIRIBA ONTITA)** had sued **(ALBERT MONGARE OKEMWA)** the respondent claiming a sum of Kshs.538,000/= on account of money he had advanced to the respondent by deposited way of deposit into the respondent's account at **NIC Bank Eldoret Branch** less kshs. l0,000/- refunded via Mpesa. The respondent denied receiving any money from the appellant and filed a counter-claim for Kshs.3,378,499/- allegedly on account of the appellant having been his employee and receiving money meant for the respondent in the course of employment but failing to surrender the same to the respondent.

2. The appellant's testimony at the trial was that he received an oral request from the respondent for a loan. Pursuant to that oral request he deposited money into respondent's personal bank account at NIC Bank as follows:

On 14/4/2014 - Kshs.200,000/-

Kshs. 198,000/-

On 17/6/2014 - Kshs.150,000/-

Total Kshs.548,000/-

In support of this, the appellant relied on the banking in-slips (both handwritten and printed) and the bank statement for account No. 100xxxxxxx. The appellant did not have an agreement to show what was the purpose of the monies.

3. The appellant's evidence as regards the cash deposits by the appellant was supported by the testimony of **NAIMA AMIR** (PW2) an employee of the NIC Bank who produced the bank statement for the respondent, in respect of the period in question, but she could not tell why the monies were deposited.

The appellant denied claims that he was an employee of the respondent or that he received any money from or on behalf of the respondent.

4. In his defence, the respondent (an interior designer) confirmed that he knew the appellant as a neighbour and brother, who worked in his shop in the year 2014. He denied receiving the sum of Kshs. 548,000/- from the appellant while at the same time asserting that the sum of Kshs.548,000/- was received by him but it was part of the proceeds from his business which the appellant had received on his behalf. That apart from the bare statement he was unable to prove that the appellant was his employee and that he received any money on his behalf. He did not even have the alleged auditors report and any other document produced in evidence in support of his assertion.

5. The trial Court having considered the evidence adduced by the Plaintiff in this matter found that there was no evidence to support the Plaintiffs claim that the money deposited into the Defendants account was money that he was lending to the Defendant and not money from the Defendant's business as the Defendant's had alleged. The Court further stated that in civil cases the standard of proof is on a balance of probability.

6. The Court found that the Plaintiff had failed to meet this standard especially since there was no agreement between him and the Defendant and the fact that he did not call any witnesses who were present when the Plaintiff and the Defendant entered into the agreement, and the Plaintiff did not indicate on the deposit slip the purpose for which he was depositing the money into the Defendant's account.

7. On the Defendant's counterclaim, the Court found that although the Defendant had given the indication that an audit had been carried out, the said auditor did not present himself before the Court in order to allow the court an opportunity to test the veracity of the said order, and did not produce any letter of appointment to prove that indeed the Plaintiff was his employee. The Court stated that the mere fact that Defendant further alleged that a complaint and criminal proceedings were instituted against the plaintiff in itself is not sufficient proof that the Defendant has a valid claim against the Plaintiff. In dismissing both the Plaintiff's suit and Defendant's counterclaim, the Court found that both Plaintiff and Defendant had failed to prove their cases on a balance of probability as is required by law and ordered that each party bear their own costs.

8. The Plaintiff being dissatisfied with the decision of the trial Court lodged this appeal on the following grounds:

i) That the trial Magistrate erred in dismissing the Appellant's claim.

ii) That the trial Magistrate erred in law and fact in finding that the appellant had not made out a case against the Respondent on a balance of probability.

iii) That the trial Magistrate's decision is as a whole legally and factually unsound.

iv) That the trial Magistrate erred in law and fact in holding that production of the banking slips was insufficient to prove that the Respondent received money from the Appellant.

v) That the trial Court's judgement is contradictory and/or inconsistent

vi) The decision is unjust.

In this appeal the Appellant prayed for:

i) The decision of the subordinate court be set aside.

ii) The Appeal be allowed.

iii) Judgment entered in favour of the Appellant against the Respondent for Kshs.538,000/= plus interest thereon at the court rates since 17th October, 2014 when the suit was filed.

iv) The Appellant to be awarded cost of the suit and the appeal.

Issue for Determination

9. The issue for determination before this Court is: **Whether the money deposited by the Appellant in the Respondent's account was a loan advancement and hence guaranteeing a refund?**

10. The Appellant in his submissions maintains that the sum of Kshs.548,000/- deposited in the Respondent's account was a friendly loan. He submitted that he had discharged the burden incumbent on him that he is the one who deposited the said amount into the Respondent's account, and that the same was buttressed by the evidence of the bank's employee PW2. He argued that once the Appellant proved that the money, he deposited into the Respondent's account was his, the burden shifted to the Respondent to prove otherwise. He contended that, the Respondent was totally unable to discharge the burden of proving that the money was his, nor did he prove the alleged employment, and the Appellant's receipt of any money on his behalf.

11. The Appellant further submitted that as a matter of fact no business or employment record was tendered in evidence, stating further that none of the alleged employees of the Respondent testified. He also pointed out that PW2 confirmed the obvious, because once money is deposited in the customer's account the funds in the account belong to the account holder. That the evidence of PW2 did not negate the fact that the depositors of the funds and who was claiming the money was and remains the Appellant. He urged this court to find that the evidence of PW2 did not in any way advance the Respondent's cause, instead it was favourable to and advanced the Appellant's cause.

12. The Appellant argued that the Respondent had misapprehended the provisions of ***Section 3(1) of the Law of Contract Act, as*** the same had no application to the dispute at hand. It was his contention that this provision deals with how one becomes or assumes liability of another person, stating that in the current appeal the Respondent was not being called upon to shoulder somebody else's indebtedness or liability, he was simply required to shoulder is personal indebtedness or liability.

13. The Appellant also submitted that the phrase 'money at hand' simply means that the money available at the business premises, stating that the same was different from the money at the bank. He stated that the same was therefore distinguishable from the money at the bank, which was the matter in this dispute. Further, that he had proved the source of the deposits as himself, hence he was entitled to them. The Appellant urged this Court to set aside the judgment of the lower court and enter the judgment in his favour for Kshs538, 000/-, being Kshs. 548,000/- less the Kshs10,000/- repaid through M-pesa, plus interest, and cost of the appeal and the subordinate court, both for the suit and the counterclaim.

14. The Respondent submitted that the Appellant did not produce any documents to prove existence of an agreement between them, relating to advancing a loan to the, nor did he call any witness to support the existence of an oral agreement between them. He argued that for one to suggest that there existed on oral agreement between the Appellant and the Respondent for advancement of a loan, then it would require to look at the events that led to the appellant being charged with an offence of stealing by servant. The Respondent further argued that it was not possible for the appellant to be charged with such kind of offence if there was no existence of an employee and employee relationship. He submitted that the onus of proving that the amount alleged to be a loan was upon the Plaintiff who never adduced any evidence to that effect.

15. The Respondent cited the provision of ***Section 3(1) of the law of Contract Act*** which provides that:

> ***"no suit shall be brought whereby to charge the Defendant upon any promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.***

16. He urged this court to find that the Appellant had not discharged that burden hence urging that this appeal be dismissed. It was also his contention that the conduct of the parties has also not suggested the existence of a loan agreement but rather an employee and employer relationship and the money deposited in the Respondents accounts are monies received in the cause of employment. Hence, this court being urged to dismiss this appeal with costs to the Respondent.

Analysis and Determination

17. It is trite law in evidence that he who alleges must prove. ***Section 107(i) of the Evidence Act*** provides that:

> ***"However desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

18. This Court in reading of the proceedings and submissions of each party finds that no evidence was adduced by the Appellant of advancing the Respondent with a loan. In such cases, the burden of proof lies with whoever would want the court to find in their favour in support of their claims.

Section 108 of Evidence Act, further states that:

> ***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

19. In this case the Appellant demonstrated that he deposited a sum of Kshs.548,000/- in the Respondent's account on diverse dates being 14th April 2014 and 17th June, 2014 respectively, a fact that was confirmed by PW2 being the bank manager NIC bank, where the money was deposited. He stated that out of the loan amount, the Respondent paid him Kshs10,000/-, via M-PESA, but there was no documentation to buttress that position. This becomes a battle of the Appellant's word against the Respondent's word. In such a scenario this Court is guided by what the law provides.

20. The governing law in this scenario would be ***Section 107(i) of the Evidence Act.*** Since the Appellant is the one alleging advancing loan to the Respondent, it is his responsibility to produce evidence to that effect. The deposit slip produced by him is not sufficient proof of there being a friendly loan, as it does not indicate the purpose for which the money was being deposited, and the Court is not allowed to be seen aiding any party to a suit, by filing in the gap. In the instant case, the hands of this Court are tied, and there is nothing the Court can do beyond the evidence produced before it, but use this opportunity to educate members of the public on how to deal with similar cases in future. This Court would like to advice fellow Kenyans to be more vigilant and learn to document any form of transaction or agreement, even between blood relatives, for this the only way one can cover their backs in cases where the transaction turns sour.

21. It is difficult, even on a balance of probabilities to conclude that the money (Kshs.538,000/-) deposited by the Appellant in the Respondent's account was a loan and does not guarantee the Appellant a refund. I do not find any error in applying the principles of law, or in considering the facts, to arrive at the decision the trial court reached. The upshot is that the appeal lacks merit and is dismissed. I order each party to bear its own costs.

E-DELIVERED, AND DATED AT ELDORET THIS 9TH DAY OF APRIL 2021

H. A. Omondi

Judge